



3 0864 1006 3516 1

## HUMAN RIGHTS COMMISSION

Sub-Chapter 1  
Organizational Rules

24-3.9(1)-0900 Organization of the Human Rights Commission. The Human Rights Commission herein adopts and incorporates the organizational structure of the Human Rights Commission as it has been set out and explained in Sec. 24-2.1-0100 (1)(e) of the Montana Administrative Code.

24-3.9(1)-0910 Organization of the Human Rights Bureau. The Human Rights Bureau shall have the organizational structure as it has been set out and explained in Sec. 24-2.1-0100(2)(b) of the Montana Administrative Code.

Sub-Chapter 2  
Procedural Rules

24-3.9(2)-P920 Definitions. The following definitions apply throughout this chapter:

- (a) "Bureau" means the Human Rights Bureau of the Department of Labor and Industry.
- (b) "Bureau Chief" means the Chief of the Human Rights Bureau.
- (c) "Commission" means the Human Rights Commission created by Sec.82A-1015, R.C.M. 1947
- (d) "Commissioner" means a member of the Human Rights Commission.
- (e) "Act" means Title 64, Chapter 3, R.C.M. 1947, "Freedom from Discrimination".
- (f) "Department" means the Department of Labor and Industry.

24-3.9(2)-P930 Pre-hearing Procedure. The following rules outline the procedure followed by the Human Rights Commission and the Human Rights Bureau prior to hearing, beginning with the filing of a complaint and continuing through conciliation. The pre-hearing stage is utilized for informal negotiations by the bureau staff, with the object of reaching a conciliation agreement between the parties. No rights or duties are determined at this stage. The bureau staff investigates to determine if a violation of the law appears to exist, and if such is probable, meet with the parties to reach an agreement which eliminates and remedies apparent discrimination. If conciliation fails, or if a conciliation agreement is not honored, the complaint goes to the Human Rights Commission for a hearing. At that point, the case is contested, as defined by the Administrative Procedure Act, and the procedural rules for contested cases, Rules 13-27B, apply.

24-3.9(2)-P940 Pre-hearing; Confidentiality. To protect the individual's right to privacy, neither a complaint nor information acquired from investigation of a complaint by the bureau staff or by the Equal Employment Opportunity Commission (federal) are matters open to the public or to employees of the Department of Labor and Industry other than bureau staff, or to any other state agency, prior to the time a complaint is referred to the Commission for hearing, the point at which a case becomes contested. Any conciliation agreement made will be made public only with the written consent of the parties.

Pre-hearing; Emergency order. If, after a complaint is filed, it is apparent that substantial and irreparable damage to the complainant will occur unless immediate action is taken, the bureau chief may so inform the Commission, which will decide by majority whether to petition the appropriate district court for an injunction to prevent or remedy the action causing that damage. Sec. 64-308(3), R.C.M. 1947, limits such a court order to fourteen (14) days, unless the respondent con-

PLEASE RETURN

MONTANA STATE LIBRARY  
930 East Yellowstone Avenue  
Helena, Montana 59601  
STATE OF MONTANA

2  
542.085  
1424  
1995

sents to an extension and the court finds reasonable cause to believe the respondent has committed a discriminatory act.

24-3.9(2)-P960 Pre-hearing; Complaint, who may file. Anyone with information concerning an alleged violation of Title 64, Chapter 3, R.C.M. 1947, may submit it to any member of the staff of the Human Rights Bureau or to a commissioner. If the person submitting the information is himself aggrieved by such alleged violation, he may file a complaint, in accordance with MAC Sec. 24-3.9(2)-P970. In the alternative, the bureau chief may file a complaint based on information received by the bureau. The complaint must be filed within one hundred eighty (180) days of the act of discrimination, or cessation of a pattern of discrimination.

A person "aggrieved" within the meaning of this section shall include any group, organization or association whose membership includes representatives of an ethnic, racial, religious, age, sex or disability group alleged to be aggrieved by a discriminatory act or practice or which exists for the purpose of fostering or protecting the interests of such ethnic, racial, religious, age, sex or disability group or groups.

The bureau may receive information in any form which alleges a violation of the act and may file a complaint based upon it. Any individual or interest group providing information upon which the bureau files a complaint will be kept informed of the progress of that complaint, if they so request. If a person elects to submit such information in the form of a sworn statement identifying the name and address of the informant and his interest in the matter, the following procedure shall apply:

- (a) The staff of the bureau shall investigate the matter to determine if a complaint should be filed.
- (b) If the staff find no reasonable cause why a complaint should be filed they shall notify the informant of this fact in writing and the matter shall proceed no farther.
- (c) If, however, the staff do find reasonable cause why a complaint should be filed they shall file a complaint and proceed under these rules.
- (d) Any person submitting a sworn statement under this section shall receive notice of all stages of the proceeding for which notice is sent to a complainant.

24-3.9(2)-P970 Pre-hearing; Complaint, place and manner. Complaints alleging a violation of Title 64, Chapter 3, R.C.M. 1947, shall be filed with the Human Rights Commission by either mailing or personally delivering them to the office of the Human Rights Bureau, Rm 412, Power Block, Helena, Montana, 59601. Complaints are to be in writing and shall be sworn to before a notary public or other person authorized by law to administer oaths and take acknowledgments. (If a notary public is not available, note the provision in MAC Sec. 24-3.9(2)-P990.) The complainant shall receive a copy of the complaint.

Complaint forms are available to anyone upon request from the above office. Anyone wishing aid in writing a complaint may call or personally see any of the staff members of the bureau.

24-3.9(2)-P980 Pre-hearing; Complaint, contents. A complaint shall contain the following:

- (a) The full name, address, and telephone number, if any, of the person making the complaint.
  - (b) The full name, address, and telephone number, if any, of the person against whom the complaint is made (hereinafter referred to as the respondent).
  - (c) A clean and concise statement of the facts, including pertinent dates, constituting the alleged unlawful discriminatory practice.
- If the complaint is filed by the bureau chief, only (2) and (3) above are necessary.

- (d) A statement disclosing whether proceedings involving the alleged unlawful

discriminatory practice have been commenced before any other state or local authority, and, if so, the date of such commencement, the name of the authority, and the disposition of the case.

Use of the complaint form available from the bureau is recommended, but not necessary. The following is a sample form.

COMPLAINT OF DISCRIMINATION	Date Filed	Case No.
INSTRUCTIONS: If you believe you have been discriminated against, fill in this form as completely as possible. Mail to: Dept. of Labor Human Rights Bureau Rm. 412, Power Block Helena, Mt. 59601	Cause of Discrimination	Area of Discrimination:
	Creed or religion	Employment
	Age	Training, Education
	Sex	Housing
	Race	Public accommodations
	Handicap, Physical or mental	Financing
	Political belief	Government services
National origin	Retaliation	

Complainant's name	Age:
Address	Soc. Sec. No.
Phone	
The following person always knows where to contact me:	
Name:	Phone
Address:	Phone
The person, employer, organization or agency who, I believe, discriminated against me is:	
Name:	Phone:
Address:	Phone:
Type of organization:	City, County, Zip Code

Date or time period of discrimination \_\_\_\_\_ If action has been sought through any other agency, give name and address: \_\_\_\_\_

Explain as fully as possible how you were discriminated against with as many details and statements of fact you can provide. If more space is needed, attach additional pages.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Notary Public for the State of Montana.  
Residing at \_\_\_\_\_, Montana.

I prepared this complaint for the above party. I am at least 18 years of age and of sound mind.

My Commission expires \_\_\_\_\_

24-3.9(2)-P990 Pre-hearing; Complaint, insufficiency, effective date of amendments. Notwithstanding the requirements of MAC Sec. 24-3.9(2)-P980, a complaint is deemed filed when the Human Rights Bureau receives a written statement sufficient to identify parties and describe the actions being complained of. If the description does not state facts establishing an unlawful practice over which the commission has jurisdiction, the bureau will immediately contact the complainant to ascertain if other facts exist that, when added to the complaint, would describe such an unlawful practice. If such facts do not exist, the complainant will be informed that the commission has no jurisdiction over the complaint and the complaint will be considered withdrawn. Any amendments to cure defects or omissions, including facts added to establish jurisdiction, will relate back to the original filing date. Amendments may be made to cure defects or omissions, including failure to swear the charge is true, or to clarify and amplify allegations, or to allege additional acts directly related to or growing out of the subject matter of the original complaint. Notice of any amendment shall immediately be made in writing to all parties.

This provision is intended to facilitate filing a complaint by individuals who, due to lack of access to a notary, or other hardship, do not or cannot submit a complaint to the bureau in the first instance that meets all the requirements of these rules.

24-3.9(2)-P9000 Pre-hearing; Complaint, withdrawal of a complaint by an aggrieved person; Refiling by the Bureau. A complaint filed by an aggrieved person may be withdrawn by his or her written request, but if the facts upon which the complaint is based, after investigation by the bureau staff, constitute a reasonable cause for belief a violation of Title 64, Chapter 3, R.C.M. 1947, has occurred, the bureau chief may refile the complaint on behalf of the Department.

24-3.9(2)-P9010 Pre-hearing; Complaint, class action. If the facts of a given complaint affect a large number of people in the same manner as the complainant, and the conditions of Rule 23 of the Montana Rules of Civil Procedure are met, the bureau may designate the complaint a class action.

Notice of intent to maintain a class action shall immediately be sent to the commission members. As soon as practicable after notice is sent, the commission shall approve or disapprove the class action. Such decision may be conditional, and may be altered or amended at any time before final determination by the Commission after a hearing.

Rule 23 shall also govern notice to members of the class, withdrawal of a member from a class, use of his own attorney by a class member, the effect of Commission findings on a class, maintenance of a class action in regard to particular issues or sub-classes, supplementary orders controlling conduct of the action, and dismissal or compromise of the complaint.

24-3.9(2)-P9020 Pre-hearing; Complaint, intervention. At any time until a conciliation agreement is made, or until the date of hearing if conciliation is unsuccessful, anyone may intervene in a complaint, subject to the approval of the Commission, if he is aggrieved by a violation of the act allegedly committed by the same respondent named in the complaint.

The department may also intervene during the above time period.

24-3.9(2)-P9030 Pre-hearing; Complaint, forwarded from Equal Employment Opportunity Commission. Pursuant to Section 706(c) of Title VII of the 1964 Civil Rights Act, the Commission may accept complaints of unlawful discrimination from the United States Equal Employment Opportunity Commission, which have been received by the latter agency, and which allege an unlawful discriminatory prac-

tice under Title 64, Chapter 3, of the Revised Codes of Montana, 1947, and are within the jurisdiction of the Commission. Transmittal of such complaints from the Montana Human Rights Commission may be by whatever method is most convenient to the Equal Employment Opportunity Commission.

The date of filing shall be the date the complaint is received by the Equal Employment Opportunity Commission.

If a complaint is deferred to the Commission by the Equal Employment Opportunity Commission, on condition that information related to the complaint and obtained by the latter agency be kept confidential, that condition will be honored by the Commission and bureau staff.

No complaints will be accepted by the Human Rights Bureau when the discriminatory act occurred before July 1, 1974, the date upon which R.C.M. 1947, Title 64, Chapter 3, went into effect.

24-3.9(2)-P9040 Pre-hearing; Complaint, service of notice of filing. Within ten (10) days after the filing of a complaint, the bureau shall furnish the respondent with a notice thereof by mail or in person (including the date, place and circumstances of the alleged unlawful discriminatory practice).

24-3.9(2)-P9050 Pre-hearing; Complaint, notice to Commission. The bureau shall each month, in writing, notify the members of the Commission of all complaints filed that month and the disposition of those already reported to the Commission in prior months.

24-3.9(2)-P9060 Pre-hearing; Investigation, illegality of obstruction. After notice is given to the respondent of the filing of a complaint against him, bureau staff members will investigate the charge. Informal investigation includes taking written statements and examining records and any other printed materials relevant to the complaint.

Any interference with the investigation with the intent to hamper or prevent the acquisition of evidence relevant to determining whether a violation of the act has been committed is unlawful, under Sec. 64-312(3), R.C.M. 1947. Such interference shall include, but not be limited to, threatening potential witnesses, discharging individuals giving testimony, or refusing to allow inspection of records.

24-3.9(2)-P9070 Pre-hearing; Reasonable cause determination. Within twenty (20) days after notice is sent to a respondent, the bureau chief of the Human Rights Bureau shall decide whether reasonable cause exists to believe that a violation of the act has occurred, based upon the evidence produced by the investigation. Further time will be allowed, beyond twenty days, for that decision if the investigation has encountered extraordinary difficulties, such as the absence of principal witnesses from the state, the refusal of the respondent to freely offer evidence, or the necessity for time to examine voluminous records.

24-3.9(2)-P9080 Pre-hearing; Procedure if no cause found. If no cause is found to believe that a violation of the act has occurred, the Commission at its next meeting shall consider all the evidence produced by the bureau's investigation and either affirm the finding with a dismissal order, or order the finding changed to show reasonable cause exists.

If a finding of no cause is affirmed, the complainant's administrative remedies are exhausted, and he or she may bring suit in state district court to redress the grievance.

Notice of the no cause finding will be sent to the complainant, to include the following:

- (1) reasons for such finding;
- (2) fact that the Commission will consider the finding and issue a dismissal

order based upon it or order it reversed;

(3) right to bring action in state court, where applicable.

A sample notice is included below:

HUMAN RIGHTS COMMISSION  
NOTICE OF FINDING OF NO CAUSE FOR COMPLAINT

To: Helen Smith  
1208 North 26th Street  
Great Falls, Montana

From: Sandra Swift  
Chief, Human Rights Bureau  
Room 412, Power Block  
Helena, Montana

Case No. \_\_\_\_\_ Human Rights Bureau telephone: \_\_\_\_\_

After investigation, the staff of the Human Rights Bureau have recommended to the Human Rights Commission that your complaint should be dismissed for the following reasons:

Your employer, James Skelton, produced evidence showing you were fired for failure to adequately do your job, and there was no evidence that prejudice against you because of your sex played any part in your dismissal, as was charged.

The Commission cannot hear your case unless discrimination based upon sex or other illegal discrimination exists under R.C.M. 1947, Title 64, Chapter 3.

At its next meeting, October 3, the Human Rights Commission will consider the evidence from the investigation and either order your complaint dismissed or reverse this recommendation. You will be notified of their decision immediately after that meeting.

Even if the Commission issues a dismissal order, you are entitled to bring action in a state district court, based on these same facts, pursuant to Sec. 64-301, R.C.M. 1947.

\_\_\_\_\_  
Chief, Human Rights Bureau

24-3.9(2)-P9090 Pre-hearing; Conciliation; agreement no admission of guilt; terms of conciliation agreement. If there is a reasonable cause finding, both parties will be invited to confer with bureau staff in an attempt to come to a written agreement that will adequately remedy the acts complained of. If the respondent signs such an agreement he is not held to be admitting to a violation of law, but, rather, he is regarded as attempting to find a reasonable, direct and swift means of curing what may be an unlawful discriminatory act.

A conciliation agreement shall include in its terms means whereby the bureau staff may monitor respondent's compliance with it. The complainant, in the agreement, shall waive all right to pursue a civil or criminal action based upon the same facts against the respondent, conditioned upon respondent's compliance with the terms of the agreement.

If the department is not itself the complainant, a conciliation agreement must be approved and signed by all parties and the bureau chief, on behalf of the Commission, to be valid. The bureau chief may refuse to sign, even if individual parties agree, if the remedies outlined in the agreement are considered to be inadequate to cure the discrimination complained of, in which case the complaint shall be noticed for hearing. In the alternative, the bureau chief may sign an agreement curing only part of the discrimination apparent from the bureau's investigation, and continue to attempt conciliation to cure the discriminatory act remaining without remedy, based upon either the department's status as intervenor in the original complaint or upon an original complaint filed by the department based upon the discriminatory acts remaining unconciliated.

24-3.9(2)-P9100 Pre-hearing; Failure of conciliation. If either the complain-



ant or the respondent refuses to confer within a reasonable period of time or to sign a conciliation agreement, or, after signing, there is reasonable cause to believe the terms of the agreement are not being fulfilled, the complaint shall be set for hearing before the Commission. The bureau chief shall decide if the above circumstances exist and necessitate a hearing.

24-3.9(2)-P9110 Adoption of Model Rules, with amendments. Pursuant to the authority vested in it, the Human Rights Commission adopts the Model Rules proposed by the Attorney General as adopted by the Department of Labor and Industry, namely: the Rules of Procedure Applicable to Rule Making Functions, MAC 1-1.6(2)-P650 through MAC 1-1.6(2)-P6060 (Rules 1-12); the Rules of Practice in Contested Cases, MAC 1-1.6(2)-P6070 through MAC 1-1.6(2)-P6210 (Rules 13-2.); the Rules of Procedure Applicable to Declaratory Rulings by Agencies, MAC 1-1.6(2)-P6220 through MAC 1-1.6(2)-P6280 (Rules 28-34); and the Miscellaneous Rules Applicable to All Proceedings Under the Administrative Procedure Act, MAC 1-1.6(2)-P6290 through MAC 1-1.6(2)-P6320 (Rules 35-38), with the addition of underlined amendments in the following rules:

Rule 13. Contested Cases, Preamble and Summary. The Administrative Procedure Act sets up particular procedures in case of agency actions specifically directed to a party. Section 82-4202(6) defines a "party" as:  
"...or any person or agency named or submitted as a party, or properly seeking and entitled as of right to be admitted as a party; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes."

These procedures are referred to as contested cases. Section 82-4202(3) defines a contested case as:

"...any proceeding before an agency in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for a hearing. The term includes, but is not restricted to, rate making, price fixing and licensing."

Contested cases provide an opportunity for a person to obtain a hearing before an agency to contest the agency's intended action against him or action which directly affects him.

The essential requirements of contested case procedures are: sufficient notice of opportunity to be heard, fair hearing, and the right to judicial review on a proper record. The Administrative Procedure Act provides all the elements of due process. Because an appeal to district court is, unless other statutes apply, on the weight of the evidence, it is necessary that agencies prepare a complete record of the proceedings before them in contested cases. Section 82-4209(5) delineates all items that must be included in the record. Rules 13-27 set forth the procedure for the initiation of, conduct of, and ruling on contested cases.

Rule 14. Notice of Opportunity for Hearing. Under the APA, a contested case exists whenever a proceeding before the agency determines the legal rights, duties or privileges and the law requires an opportunity for hearing. In the case of the Human Rights Commission, a contested case exists whenever the Human Rights Bureau has been unable to eliminate charged illegal discrimination informally by conciliation and the dispute by law (Sec. 64-308(5), R.C.M. 1947) goes to the Human Rights Commission for a finding. In a contested case all parties are afforded an opportunity for a hearing after reasonable notice. Such notice will be served in the manner provided for in Rule 4D, Montana Rules of Civil Procedure.

Section 82-4209(2) provides that the notice shall include:

"(a) A statement of the time, place and nature of the hearing.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved."

Section 64-308(5) also requires that a copy of the complaint accompany the notice.

The notice should include a provision advising parties of their right to be represented by counsel at the hearing, though the complainant may also choose to have the case in support of his complaint be presented by the attorney of the Human Rights Bureau.

The following is a sample form of notice of opportunity for hearing.

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

Thomas Matthews,                    )  
    Complainant,                    )  
vs.                                    )  
George P. Rogers,                    )  
    Respondent.                    )

NOTICE OF HEARING REGARDING  
COMMISSION OF AN UNLAWFUL  
DISCRIMINATORY ACT

To: George P. Rogers

At 1:30 P.M., July, 1975, in the small courtroom of the Missoula County Courthouse, Missoula, Montana, a hearing will be held to determine if you have committed an unlawful discriminatory act.

This hearing is held under the authority of Section 64-308(5). Violation of Section 64-306(1)(a) is alleged.

You are accused of refusing to hire Thomas Matthews because of his race. A copy of the complaint accompanies this notice.

You have a right to be represented by counsel at the hearing. If you fail to appear at the hearing, the Human Rights Commission will at that time hear all the facts available and base its decision and final order on these facts.

Dated June 1, 1975.

s/ Jane Conway  
Human Rights Commissioner

Rule 15. Contested Cases, Immediate Suspension or Refusal to Renew a License.  
(delete entirely)

Rule 16. Contested Cases, Default Order When Party Fails to Appear at Hearing.  
(delete old rule entirely) When notice of a hearing has been given, but a party fails to appear at the time specified for that hearing, the Commission shall enter an order at that time, stating the evidence before it supporting the Commission's action. If the defaulting party is able to show good cause for his absence, the order will be vacated and a new hearing date set.

Rule 17. Contested Cases, Informal Disposition, Pre-hearing Conferences.  
Section 82-4209(4) provides for informal disposition of any contested cases where not precluded by law, by stipulation, agreed statement, or consent order. (delete "or default. For default see Rule 16.")

Parties may agree to the result. To this end the Commission may hold one or more informal conferences on notice to all parties. (delete last sentence of this paragraph)

An informal conference may be used to define issues, determine witnesses and



agree upon stipulations, in the nature of a pre-trial conference.

Rule 18. Contested Cases, Application for More Definite and Detailed Statement. Upon application to the Commission or the designated hearing examiner, a party who has been given notice of a hearing may apply for a more definite and detailed statement of the issues involved in the hearing. Section 82-4209(2).

Rule 19. Contested Cases, Subpoenas and Depositions. Upon request of any party appearing, the Commission shall issue subpoenas for witnesses or subpoenas duces tecum, which shall be served in the same manner as subpoenas to civil actions. Except as otherwise provided by statute, witness fees and mileage shall be paid by the party requesting the issuance of the subpoena. Section 82-4210.

Rule 20. Contested Cases, Hearing Examiners. Section 82-4211 allows the Commission to appoint hearing examiners for the conduct of hearings in contested cases. Hearing examiners or commission members have the following powers: "...to administer oaths or affirmations; issue subpoenas pursuant to section 20 (82-4220) of this act; provide for the taking of testimony by deposition; regulate the course of hearing, including setting the time and place for continued hearings and fixing the time for filing of briefs or other documents; and direct parties to appear and confer to consider simplification of the issues by consent of the parties. All testimony shall be given under oath or affirmation." Section 82-4211(2). When a case is set for hearing the commission must advise all parties of the appointment of either commission members or a hearing examiner to manage the case." The following is a sample form of an order appointing a hearing examiner.

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

Thomas Matthews,	)	
Complainant	)	
vs.	)	APPOINTMENT OF HEARING EXAMINER
George P. Rogers,	)	
Respondent.	)	

On June 1, 1975, a Notice of Hearing to determine if an unlawful discriminatory act has been committed was served on George P. Rogers.

Henry Doright is hereby appointed the hearing examiner in the above action. All correspondence and motions in the above matter will be directed to the hearing examiner at: 36 Last Chance Gulch, Helena, Montana.

Dated June 11, 1975

s/ Jane Conway  
Human Rights Commissioner

Disqualification of a hearing examiner or agency member is provided for under Section 82-4211(3).

Rule 25 provides an opportunity for parties to contest a hearing examiner's report when a majority of the commission members have not themselves read the record and are basing their order on that report.

Rule 21. Contested Cases, Hearing. (1) The hearing shall be conducted before three to five members of the Commission, or a hearing officer designated in accordance with Rule 20.

2. At the discretion of the presiding officer, the hearing shall be conducted in the following manner:

- (a) Statement and evidence of parties in support of the complaint.
- (b) (deleted)
- (b) Statement and evidence of parties disputing the complaint.
- (c) Rebuttal testimony.
- (3) The presiding officer and the parties or their attorneys shall have the right to question, examine or cross-examine any witnesses.
- (4) The hearing may be continued with recesses as determined by the presiding officer.
- (5) The presiding officer will insure that all parties are afforded the opportunity to respond and present evidence and argument on all issues involved. Section 82-4209(3).
- (6) Exhibits shall be marked and the markings shall identify the person offering the exhibits. The exhibits shall be preserved by the Commission as part of the record of the proceedings.

Rule 22. Contested Cases, Record. Section 82-4209(5) and Commission amendments (underlined) provide that the record in a contested case shall include the following:

- "(a) All pleadings, motions, intermediate rulings.
  - (b) All evidence received or considered, including a stenographic record of oral proceedings when demanded by a party. With permission of a party a tape recording may be substituted for a stenographic record.
  - (c) A statement of matters officially noticed.
  - (d) Questions and offers of proof, objections, and rulings thereon.
  - (e) Proposed findings and exceptions.
  - (f) Any decision, opinion or report by the hearing examiner or Commission members presiding at the hearing.
  - (g) All staff memoranda or data submitted to the hearing examiner or members of the Commission as evidence in connection with their consideration of the case."
- Section 82-4209(6) provides that on request of any party the stenographic record or oral proceedings shall be transcribed with the cost of transcription to be paid by the requesting party unless otherwise provided for by law. Tape recordings will also be made of each hearing, and a party, in place of a stenographic record, may request a duplicate recording, the party paying the cost of the duplicate.

Rule 22A. Contested Cases, Motions. All motions other than those made during a hearing shall be made in writing and submitted to the Commission, shall briefly state the relief sought, and shall be accompanied by affidavits setting forth the grounds upon which they are based. The moving party shall serve a copy of all motion papers on all other parties and shall, within three (3) working days thereafter, file with the Commission the original and five (5) copies thereof with proof of service. Answering affidavits, if any, must be served on all parties and the original thereof, together with five (5) copies and proof of service, shall be filed with the Commission within five (5) working days after service of the moving papers, unless the Commission directs otherwise. The Commission shall rule upon motions filed with it. It may decide to hear oral argument to testimony thereon, in which case it shall notify the parties of such fact and of the time and place of such argument or for the taking of such testimony. The Commission shall issue rulings and orders to decide all matters in hearings before it and all such rulings and orders thereon shall be part of the record of the proceedings.

Rule 23. Contested Cases, Evidence. Section 82-4210 provides that unless otherwise provided by a statute directly relating to the agency, the agency is bound by common law and statutory rules of evidence. Objections to offers of evidence may be made and the Commission will note them in the record. To expedite

the hearing, if the interest of the parties are not prejudiced, any part of the evidence may be received in written form. A party intending to offer any such exhibit, documents, data, or other tangible evidence at the hearing shall furnish copies to all other parties at least ten (10) days before the hearing, unless excused by the Commission.

Where the original of documentary evidence is not readily available, the best evidence rule is modified to allow copies or excerpts.

A party shall have the right to conduct cross-examination for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by, on behalf of, or for the use of the Commission and offered into evidence.

The presiding officer may take notice of judicially cognizable facts, generally recognized technical or scientific facts within the Commission's specialized knowledge. Parties shall be notified of materials noticed and be given an opportunity to contest materials noticed.

In evaluating evidence the Commission may use its experience, technical competence and specialized knowledge.

Rule 24. Contested Cases, Ex Parte Consultations. Section 82-4214 is a provision to protect all parties in a contested case from informal "deals" between the Commission and one of the parties. It provides that, upon issuance of notice of hearing, those persons who are charged with the duty of rendering a decision or to make findings of fact and conclusions of law shall not communicate with any party or his representative regarding any issue of fact or law without giving notice and opportunity for all parties to participate.

The Commission or its hearing examiner will not communicate with any party on non-procedural matters without giving notice and opportunity for all parties to participate, after service of the notice of hearing.

Rule 25. Contested Cases, Proposed Orders. If a hearing examiner conducted the hearing and a majority of the Commission members have not read the record, a proposed order, including findings of fact and conclusions of law, shall be served upon the parties. An opportunity to file exceptions, present briefs and make oral arguments to the officials who are to render the decision shall be granted to all parties adversely affected. Section 82-4212.

Rule 26. Contested Cases, Final orders. A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include the following:

- (1) Rulings on admissibility of offered evidence.
- (2) Rulings on proposed findings of fact.
- (3) Findings of fact--those matters which are either agreed as fact or which when disputed, are determined by the fact finder, on substantial evidence, to be a fact over contentions to the contrary.
- (4) Conclusions of law--applications of the controlling law to the facts found and the legal results arising therefrom.
- (5) Orders--the actions taken by the Commission as a result of the findings of fact and conclusions of law. If the order is in favor of the complainant, it will include monitoring mechanisms and enforcement terms, in order to ensure compliance.

Rule 27. Contested Cases, Notification of Orders. Parties to contested cases and their attorneys shall be notified personally or by mail of any decision or order. On request, a copy of the decision or order shall be delivered or mailed to each party and to his attorney of record. Section 82-4213.

The following is a sample form of a final order, including notice of right to judicial review.

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

Thomas Matthews,	)	
Complainant,	)	EVIDENTIARY RULING, FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW, ORDER AND NOTICE
vs.	)	OF OPPORTUNITY FOR JUDICIAL REVIEW.
	)	
George P. Rogers,	)	
Respondent.	)	

After notice and hearing on the alleged violation of R.C.M. 1947, 64-306 (1)(a) by George P. Rogers, respondent, by refusing to hire Thomas Matthews, Complainant, because of his race, American Indian, the Human Rights Commission considered the evidence and exhibits and makes the following disposition of this contested case.

EVIDENTIARY RULING

At the time of the hearing, testimony from the respondent was elicited that the Equal Employment Opportunity Commission had conducted an investigation of his business in 1972, based upon a charge of racial discrimination in hiring, which was found groundless by EEOC. The testimony was objected to as irrelevant. Upon review of the testimony, the objection is sustained.

PROPOSED FINDINGS OF FACT

Both parties stipulate that, except for the high school diploma, Thomas Matthews meets the qualifications for auto mechanic.

Counsel for respondent proposed that the Commissioners find that:

(1) Thomas Matthews did not qualify as an auto mechanic because he did not fulfill a requirement of employment that he have a high school diploma;

(2) a high school diploma is a reasonable requirement for employment as an auto mechanic;

(3) such a requirement does not constitute racial discrimination.

Counsel for complainant proposed that the Commission find that:

(1) Thomas Matthews has earned a General Education Development diploma hereinafter referred to as GED in lieu of a high school diploma, and that respondent refused to accept it as the equivalent of a high school diploma.

(2) a significantly higher percentage of Indians than Caucasians fail to finish high school and therefore must fulfill high school requirements via the GED.

(3) the GED reasonably signifies educational achievement equivalent to a high school diploma.

(4) failure to accept a GED in place of a high school diploma is unreasonable, affects more Indians than Caucasians and therefore bars individuals from employment on the basis of race.

(5) the skills required of an auto mechanic are not reasonably produced or enhanced by a high school education, making requirement of that level of education for a mechanic's job an unnecessary one.

(6) Thomas Matthews, if he had been hired on the day he was rejected for employment by respondent, would have earned \$1200 as of the date the complaint was filed.

FINDINGS OF FACT

The Commission finds that Thomas Matthews has earned a General Educational Development diploma, that the GED is regularly accepted by institutions of higher education and some businesses as a substitute for a high school diploma, and that the percentage of Indians dropping out of school is greater than Caucasians, so that a greater percentage of Indians than Caucasians would be disadvantaged by a requirement of a high school education. The Commission also takes notice of the fact that since the drop-out rate for Indians is greater than that for Caucasians, and the GED is the means of obtaining a high school education after dropping out, a policy denying that the GED is equivalent to a high school diploma has a disproportionate effect, potentially, on Indians.

The evidence shows no reasonable difference between the GED and a high school diploma. Non-acceptance of the GED discriminates against Indians, therefore, with no justification shown.

If hired on the date he was rejected, Thomas Matthews would have earned \$1200 by the date of filing of his complaint and has earned \$512 during that time by obtaining other employment as an auto mechanic.

George P. Rogers discriminated on the basis of race against Thomas Matthews, without justification, by requiring any auto mechanic in his employ to have a high school diploma.

#### CONCLUSIONS OF LAW

George P. Rogers violated the provisions of Section 64-306(1)(a), R.C.M. 1947.

#### ORDER

1. The high school diploma requirement for employment by respondent as an auto mechanic shall be eliminated immediately.

2. George P. Rogers shall pay Thomas Matthews \$688 in back pay, representing \$1200 Thomas Matthews would have earned if employed by respondent, reduced by a \$512 setoff from other employment.

Dated: August 1, 1974

s/ Jane Conway  
Human Rights Commissioner

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within thirty (30) days from the service of this Order. Judicial review is pursuant to the provisions of Section 82-4216, R.C.M. 1947.

Rule 27A. Contested Cases, Enforcement of Orders. The Human Rights Bureau is responsible for informing the Commission whether the enforcement terms of the final order are being complied with. In the event that a respondent refuses to comply with an order of the Commission, the Bureau will so inform the Commission which will determine whether enforcement of its order through the district court is necessary, as authorized by Section 64-310. If the Commission decides such enforcement is necessary, it will so inform the attorney for the Human Rights Bureau, who will petition the appropriate district court for an injunction against the respondent.

Rule 27B. Contested Cases, Rules of Civil Procedure. In all cases not provided for by these procedural rules, the Montana Rules of Civil Procedure shall be utilized.

Rule 28. Declaratory Rulings and Miscellaneous Provisions, Preamble and Summary. Individuals are often in a situation where they wish to take a particular course of action but are unsure as to whether an agency regulation or statute administered by the agency would apply to their proposed course of action, or they

may be engaged in an activity which they believe is not subject to the agency's regulatory authority but persons within the agency or another agency believe the activity is subject to the agency's regulation. In such case section 82-4215 provides that the affected party may petition the agency for a declaratory ruling as to the applicability of a statute or regulation to the affected person's activity or proposed activity. Rules 29 through 34 deal in part with the applicable procedures for declaratory rulings by agencies.

Rules 35 through 38 discuss miscellaneous provisions of the Montana Administrative Procedure Act that are applicable to all proceedings instituted under the Act.

Rule 29. Declaratory Rulings, Institution of Proceedings. On petition of any interested person, the Commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the Commission.

Rule 30. Declaratory Rulings, Content of Petition. The petition shall be typewritten or printed and shall be in accordance with the sample form set forth below. The petition shall contain;

- (1) Identification of petitioner, including address.
- (2) A detailed statement of the facts upon which petitioner requests the Commission to issue its declaratory ruling.
- (3) Sufficient facts to show how petitioner will be affected by the requested ruling.
- (4) The rule or statute for which petitioner seeks a declaratory ruling.
- (5) All propositions of law or contentions to be asserted by petitioner.
- (6) The questions presented for decision by the Commission.
- (7) The specific relief requested.
- (8) The name and address of any person known by petitioner to be interested in the requested declaratory ruling.

The following is a sample form of petition for declaratory ruling.

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

In the matter of the application of	)	
John Doe, an employer, for a declaratory ruling as to the applicability of	)	PETITION FOR
Sec. 640306(1)(a), R.C.M. 1947, to his	)	DECLARATORY RULING
requirements for employment.	)	

1. Petitioner's name and address are John Doe, 378-11th Avenue, Anytown, Montana.

2. Petitioner runs a small candy store in Anytown, the Candy being homemade by himself, his wife and three other regular employees. Petitioner currently is short one employee and is interviewing applicants, including one who is slightly mentally retarded. Petitioner wishes to decline employment in his business to any retarded person, but is concerned that in so doing he will be in violation of R.C.M. 1947, Sec. 64-306(1)(a).

3. The statute as to which petitioner requests a declaratory ruling is R.C.M. 1947 Sec. 64-306(1)(a), which makes it an unlawful practice for an employer to refuse employment to a person because of his mental handicap "when the reasonable demands of the position do not require a . . . mental handicap distinction;"

4. Petitioner contends that candy-making requires the ability to hold a substantial number of recipes and other related details in one's memory, that



there is some danger involved in operating pressurized equipment to which a retarded person would be particularly vulnerable, and that some of his customers would be suspicious of the quality of his candy should they discover a mentally retarded person was making it, to the detriment of his business.

5. The question presented for declaratory ruling by the Commission is whether under the above statute the reasonable demands of this particular occupation require a mental handicap distinction.

6. Petitioner requests that the Commission rule that he may refuse to employ a mentally retarded person as a candy-maker without violating Sec. 64-306(1)(a), R.C.M. 1947.

7. Petitioner knows of no other party similarly affected.

Dated: August 22, 1974.

s/ John Doe  
378-11th Avenue  
Anytown, Montana

Rule 31. Declaratory Rulings, Filing and Notification of Disposition of Petition. (1) Filing of Petition. The petition shall be deemed filed when received by the Human Rights Bureau Rm. 412, Power Block, Helena, Montana on behalf of the Commission. The bureau will immediately send a copy of the petition to each Commission member.

(2) Notification of Disposition of Petition. After the petition has been filed, if the Commission intends to issue a ruling, the Commission shall mail to all parties named in the petition:

(a) a copy of the petition together with a copy of the Commission's rules of practice; and

(b) a notice of the hearing at which the petition will be considered.

If the Commission does not intend to issue a ruling, the Commission shall mail to all parties named in the petition a copy of the order denying the petition for declaratory ruling with the grounds for denial clearly stated.

Notification of the disposition of the petition for declaratory ruling with the grounds for denial clearly stated.

Notification of the disposition of the petition for declaratory ruling must be made within twenty (20) days of the filing of the petition.

Rule 32. Declaratory Rulings, Notice of Hearing. The notice of hearing shall set forth:

(1) A copy of the petition requesting the declaratory ruling.

(2) The time and place of the hearing.

(3) A designation of the hearing examiner or members of the Commission presiding at and conducting the hearing.

The following is a sample form of notice of hearing for a declaratory ruling.

BEFORE THE HUMAN RIGHTS COMMISSION  
OF THE STATE OF MONTANA

In the Matter of the application of )  
John Doe, an employer, for a )  
declaratory ruling as to the applic- )  
ability of Sec. 64-306(1)(a), R.C.M. )  
1947, to his requirement for employ- )  
ment. )

NOTICE OF HEARING

To: John Doe

You will please take notice that on September 5, 1974, at 9:30 A.M. in the hearing room of the State Capitol, Helena, Montana, John Doe's petition for declaratory ruling will be heard. You have a right to be represented by counsel at the hearing. A copy of the petition is attached hereto. James Justice, Capitol Station, Helena, Montana, 59601, a hearing officer appointed by the Human Rights Commission, will preside over and conduct the hearing.

Dated: Sept. 1, 1974

s/ Jane Conway  
Human Rights Commissioner

Rule 33. Declaratory Rulings, Conduct of Hearing. A hearing will be conducted in accordance with Rules 21 to 27.

Rule 34. Declaratory Rulings, Effect of Ruling. A declaratory ruling issued in accordance with these rules is binding between the Commission and the petitioner on the state of facts alleged, or found to exist. Judicial review may be had in the same manner as decisions or orders in contested cases.

Rule 35. Miscellaneous Provisions, Subpoenas and Enforcement. Section 82-4220 provides for the issuance of subpoenas in any proceeding subject to this act. The Commission shall issue subpoenas on its own motion, and on motion of any party appearing obtain enforcement through district court in the manner provided by law.

Rule 36. Miscellaneous Provisions, Representation. Section 82-4221 accords any person appearing before the Commission the right to be accompanied, represented and advised by counsel. The Commission will advise a party to any proceeding subject to this act of his right to counsel on service of notice to that party.

Rule 37. Miscellaneous Provisions, Service. Unless otherwise provided by law, Section 82-4222 requires service on parties in accordance with requirements for service in civil actions. Unless otherwise provided by law and these rules, all motions and pleadings will be served in accordance with the Montana Rules of Civil Procedure.

Rule 38. Miscellaneous Provisions, Availability of Final Orders and Decisions. The Commission will maintain an index of all final orders and decisions in contested cases and declaratory rulings. All final decisions and orders shall be available for public inspection on request at the Human Rights Bureau, Rm. 412, Power Block, Helena, Montana 59601. Copies of final decisions and orders will be made available on request to the bureau upon payment of cost of duplication. Section 82-4213(2).

#### Sub-Chapter 6

#### General Provisions

24-3.9(6)-S9120 Definitions. The terms "age", "educational institution", "employee", "employer", "employment agency", "financial institution", "mental handicap", and "public accommodation", as used in these regulations shall have the meanings stated in Sec. 64-305 of the Revised Codes of Montana, 1947, with the additional clarification that "national Origin" means the country or countries in which an individual, his parents, grandparents, and ancestors were born.

The terms "bureau", "bureau chief", "Commission", "Commissioner", "act", and "department" shall have the meanings stated in sub-chapter 2, "Procedural

24-3.9(6)-S9130 Commission meetings; Quorum; Decision-making authority.

- (a) The Commission shall meet upon call of the chairperson, or at the written request of at least three (3) members, the time or place to be designated by whomever calls the meeting.
- (b) A majority of the membership constitutes a quorum to do business. A contested hearing may be heard only by three (3) or more of the Commission members or a non-member designated by the Commission.
- (c) The Commission shall appoint a bureau staff member to act as secretary of the Commission, and general minutes of all Commission meetings whether in person or by telephone conference call shall be kept as a public record.

24-3.9(6)-S9140 Retaliation. Sec. 64-312(2) prohibits anyone from retaliating against one filing a complaint or otherwise assisting with proceedings in connection with unlawful discriminatory acts. Such retaliation shall be unlawful irregardless of whether the proceedings are at the state or federal level, or whether the complaint was filed with the Human Rights Commission or the Equal Employment Opportunity Commission (federal), so long as the unlawful discriminatory act complained of is a violation of R.C.M. 1947, Title 64, Chapter 3, the "Freedom from Discrimination" Act.

The above Sec. 64-312(2) makes retaliation by anyone a misdemeanor, a criminal offense triable in justice court. In addition, Sec. 64-306 (d) labels retaliation by an employer, labor organization, or employment agency as an unlawful discriminatory practice, over which the Human Rights Commission has jurisdiction.

If a discharged employee is reinstated by conciliation agreement or commission order and is again discharged within three months of the date of reinstatement, the burden is on the employer to prove the dismissal is not in retaliation for filing a complaint or otherwise assisting with a proceeding under the act.

24-3.9(6)-S9150 Affirmative action required by the commission. From time to time the Commission may decide that full implementation of the law requires positive action beyond the general duties of dealing with individual complaints of unlawful discrimination under the act. Examples are: (a) gathering of certain kinds of information such as pre-employment questionnaires and tests utilized by employers, and (b) development of public education programs to prevent violations of the act through ignorance.

The Commission may charge the staff of the Human Rights Bureau with specific duties to carry out the affirmative action it feels is necessary.

24-3.9(6)-S9160 Records on age, sex, and race. (a) Sec. 64-306(d) of the act requires the state, employers, labor organizations and employment agencies to maintain records on age, sex, and race, in order to facilitate administration of the act. The function of such records is to aid both those keeping the records and those responsible for enforcing the act to identify, prevent or remedy illegal discrimination and to make proof of the existence or absence of such discrimination easier for both employers and complainants in the event a complaint is filed;

- (b) The following records shall be kept:

(1) Every employer, labor organization, employment agency, or state agency in Montana which is subject to the U.S. Equal Employment Opportunity Commission (EEOC) and must keep records to fulfill its reporting requirements meets the record keeping requirements of the act for reporting, with the exception that records must be kept of the age of all employees or union members. Reports required by EEOC will be obtained from it by the Human Rights Commission, subject to any safeguards against publicizing the information that EEOC may impose. Requests

for information on employee ages will be made separately by the Human Rights Bureau.

(2) Any employer, labor organization, employment agency or state agency which is not subject to EEOC record-keeping requirements should keep records adequate to show (i) how many Negroes, Orientals, American Indians and Spanish-surnamed Americans are employed in each particular job category; (ii) how many men and women are in each racial group and each job category.

The records shall be compiled from a pay period in either February, March, or April of every year and reports, on forms supplied by the Human Rights Bureau, utilizing those records, shall be filled out by May 1 of each year, to be presented to the bureau upon request, as in connection with an investigation. The reports shall be kept on file for five (5) years.

Records on age, sex and race must be made after employment and not when a prospective employee applies for employment.

Information about racial or ethnic identity may be acquired by visual survey of the work force, and if at all possible, should not be by direct inquiry. The Commission recommends such information be kept separately from personnel records and be maintained as a running total without identification of individuals.

(3) Any personnel or employment record made or kept by an employer (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship), shall be preserved by the employer for a period of six months from the date of making of the record and the personnel action involved, whichever occurs later. In case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of six months from the date of termination. Where a complaint of discrimination has been filed, the respondent shall preserve all personnel records relevant to the complainant until final disposition of the complaint. The term "personnel records relevant to the complaint," for example, would include personnel or employment records relating to the complainant and to all other employees holding positions similar to that held or sought by the complainant and application forms or test papers completed by an unsuccessful applicant or by all other candidates for the same position as that for which the complainant applied and was rejected. A labor organization must preserve membership or referral records (including applications for them) for six months from the date of their making, or if a charge of discrimination is filed, it must preserve all records relevant to the charge until final disposition.

(c) An individual, state agency, employer, employment agency, or labor organization who willfully fails to make, keep, or preserve records or make reports in accordance with this rule commits a misdemeanor under Sec. 64-312(3) of the act.

(d) If the record-keeping requirement would impose undue hardship on one subject to it, the latter may apply to the Human Rights Commission for a modification of the requirement.

#### Sub-Chapter 10 Interpretive Rules

24-3.9(10)-S9170 Coverage; aliens. The coverage of this act includes lawfully immigrated aliens, as well as United States citizens.

24-3.9(10)-S9180 Coverage; insurance companies. Sec. 64-306(4), which prohibits discrimination in financial assistance, shall cover, in addition to insurance applied for by an individual, insurance indirectly applied for, as when all employees of a company must be insured. Refusal to insure a given employee will be construed as refusal to insure one who submits an "application for financial assistance" (the quote is from the statutory language).

24-3.9(10)-S9190 Exhaustion of administrative remedies not required. Sec. 64-301, R.C.M. 1947, makes freedom from discrimination a civil right. Anyone who is

aggrieved by discrimination based upon race, creed, color, sex, physical handicap, or national origin may either bring an action in a state district court or file a complaint with the Human Rights Bureau. The latter administrative remedy need not be exhausted before recourse to the judicial, or any other administrative or statutory remedy is available.

24-3.9(10)-S9200 Printed matter for public accommodations; when discrimination permitted. Printed communications, notices or advertisements for public accommodations may express the fact that a part or all of such accommodations may be withheld from anyone on the grounds of sex, age, physical or mental handicap only in the following cases:

- (a) when unreasonable special effort or expense would otherwise result; or
- (b) if such withholding is for the protection of those of a certain sex, age, physical or mental handicap. Whether special effort or expense is in fact unreasonable and necessary for all or most members of those classes shall be a matter for determination by the Commission on a case by case basis.

24-3.9(10)-S9210 Real property transactions; when discrimination permitted. No person may refuse to lease or rent property or housing accommodations to anyone else because of his sex, age, physical or mental handicap unless to do so would require adaption of the accommodations physically to necessary needs of the particular sex, age group, or physical or mental handicap.

If such adaption is necessary, the terms of the rental or lease may be adjusted only so far as necessary to cover the actual cost of the adaption.

If the adaption is of a temporary nature and restoration of the property to its original state would be reasonably simple (example: installation of a ramp), and the potential lessee or rentor is willing to pay the expense of such adaption, the lessor or landlord is not justified in refusing to lease or rent because such adaption is necessary.

In addition, no lessor landlord is justified in refusing to rent to a blind person because he or she has a guide dog to help overcome the handicap.

Inquiry into the sex, age, physical or mental handicap of a potential lessee or rentor is permissible only when the peculiar physical characteristics of the accommodations in question are reasonably usable only by one sex, age group, or particular level of physical or mental ability, and the inquiry is for the purpose of informing the potential lessee or rentor of that fact for his or her own benefit, not with the intent of barring that person from leasing or renting.

24-3.9(10)-S9220 Educational institutions; when discrimination permitted. If admission to a private educational institution has been traditionally limited to one sex or is run by a church which requires religious training as part of the curriculum, admission may be limited to those of the particular sex or religion, and admission inquiries and applications, catalogs and other published materials may reflect that restriction.

A school shall be deemed to be "traditionally limited" to one sex if it has admitted only one sex consistently throughout the five years prior to July 1, 1974.

If a mental handicap is severe enough to prevent an individual attaining the level of academic competence required for admission to a given post-secondary or private elementary or secondary institution, his or her exclusion from that institution is permissible.

Mentally handicapped children are specially provided for in elementary and secondary public schools by Title 75, Chapter 78, R.C.M. 1947, and such special education is endorsed by the Human Rights Commission.

24-3.9(10)-S9230 Burden of proof. The burden of proof shall be on the party desiring an exemption from the effect of the law to show that such exemption is justified.

Guidelines for Employment

24-3.9(14)-S9240 General principles. (a) The Commission will consider particular problems relating to unlawful discrimination on a case to case basis.

(b) Refusal of employment as referred to in Sec. 64-306 (1)(a), R.C.M. 1947, shall include termination of the employment of a previously-employed individual by his or her employer.

(c) The guiding principle utilized by the Commission requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics attributed to the group. If the employer believes that an occupation requires a distinction on the basis of sex, mental or physical handicap, or age, the burden will be on the employer to show that the group in question--men, women, the mentally or physically handicapped, aged or young people--consistently lack these qualities, as a group characteristic, that are essential to the occupation in question.

(d) Discrimination required by the reasonable demands of a position shall be termed a "bona fide occupational qualification" for the purposes of this subchapter.

24-3.9(14)-S9250 Sex discrimination as a reasonable demand of employment.

(a) Bona fide occupation qualification exceptions as to sex, allowed as a reasonable demand of employment, will be interpreted narrowly. Labels--"men's jobs" and "women's jobs"--tend to deny employment opportunities unnecessarily to one sex or the other.

The following situations do not warrant the application of a bona fide occupational exception:

(i) The refusal to hire a man or a woman because of his/her sex based on assumptions of the comparative employment characteristics of men or women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship.

(iii) The refusal to hire an individual because of the preference of co-workers, the employer, clients or customers.

(b) The Commission will consider sex to be a bona fide occupational qualification in the following cases:

(i) where it is necessary for the purpose of authenticity or genuineness, e.g., an actor or actress.

(ii) where public morals and not merely social preference, demand one sex be given preference in a particular job, e.g. a female attendant in a women's washroom; a woman as a fitter in the bra and girdle department of a store.

24-3.9(14)-S9260 Age discrimination as a reasonable demand of employment.

(a) Bona fide occupational qualification exceptions as to age, allowed as a reasonable demand of employment, will be interpreted narrowly.

The following situations do not warrant the application of a bona fide occupational qualification exception:

(i) The refusal to hire an individual because of his/her age based on assumptions of the comparative employment characteristics of young or old people in general. For example, the assumption that young people tend to be irresponsible, or that older people are not as productive as younger people.

(ii) The refusal to hire an older individual because the job is physically



demanding, without evidence he/she is physically inadequate to meet those demands.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients, or customers, e.g., to maintain an image as a "young" company.

(b) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider age to be a bona fide occupational qualification, e.g., an actor or actress.

(c) Where it is necessary for the purpose of protection of the public, the Commission will consider age to be a bona fide occupational qualification, e.g., a mandatory retirement age of sixty (60) for airline pilots.

24-3.9(14)-S9270 Physical handicap discrimination as a reasonable demand of employment. (a) Bona fide occupational qualification exceptions as to physical handicaps, allowed as a reasonable demand of employment, will be interpreted narrowly.

The following situations do not warrant the application of a bona fide occupational qualification exception:

(i) The refusal to hire an individual because his/her physical handicap would require the employer to make some physical adjustments to accommodate the handicap, e.g., install a ramp for a wheel chair.

(ii) The refusal to hire an individual because of the preference of co-workers, the employer, clients, or customers.

(b) Where the physical requirements of a physically handicapped person would force an extraordinary financial hardship upon an employer, a bona fide occupational qualification exception may exist.

(c) Where an individual's physical handicap would endanger the safety of himself or fellow workers a bona fide occupational qualification may exist.

24-3.9(14)-S9280 Mental handicap discrimination as a reasonable demand of employment. (a) Bona fide occupational qualification exceptions as to mental handicaps, allowed as a reasonable demand of employment, will be interpreted narrowly.

The following situations do not warrant the application of a bona fide occupational qualification exception:

(i) The refusal to hire a mentally retarded person where the job requires only simple physical labor of which he/she is capable.

(ii) The refusal to hire a mentally handicapped person because of the preferences of co-workers, the employer, clients, or customers.

(b) Where an individual's mental handicap would endanger the safety of himself or fellow workers, a bona fide occupational qualification exception may exist, e.g., using building construction equipment where emergencies requiring quick action are likely to occur.

24-3.9(14)-S9290 Employment applications. (a) General principles. The following are guidelines for determining what kinds of inquiries on employment applications will automatically be suspect as unlawfully discriminatory. The guidelines are based on the potential abuse of the inquiry, balanced against its value in determining necessary qualifications for a particular job. A given employer might not, as a matter of fact, use the suspect inquiries below to discriminate against an applicant, but their potential for abuse is so high that their use should be discouraged.

It should be noted that this list is concerned with pre-employment inquiries. Some of the inquiries below may lawfully be made after employment, if the employer needs the information they produce--for example, to obtain information on race, sex, national origin and religion for reports required by the U.S. Equal Employment Opportunity Commission.

Any inquiry not inherently discriminatory may be unlawful in fact if it is utilized to discriminate against an individual in violation of law, e.g., an

inquiry into schools attended which indirectly reveals religious affiliation, on which grounds employment is denied.

Any unlawful inquiry as listed below, subsection (b), may be lawful if it is necessary to determine a bona fide occupational requirement.

(b) Suspect pre-employment inquiries.

(1) Inquiry into the original name of an applicant whose name has been changed by court order or otherwise--race or religion may be indicated by the original name

(2) Questions regarding residency which indicate birthplace or place of foreign citizenship, former or present.

(3) Inquiry into age of applicant, unless necessary as a bona fide occupational qualification.

(4) Requirement that age be proved in the form of a birth certificate or baptismal record--these indicate place of birth, ancestry or religion. (note #3 above)

(5) Inquiries into religious affiliation.

(6) Questions regarding skin, hair or eye color--race is indicated; irrelevant to job performance.

(7) Requirement of a pre-hiring photograph, or a request for one, at the applicant's option.

(8) Inquiry into military experience outside the U.S. Armed Forces--may indicate national origin.

(9) Request for the number of times arrested--members of minority racial groups are more likely, statistically, to be arrested than Caucasians, and since an innocent person may be arrested, and arrest in fact does not always lead to conviction, an arrest record is no proof of a criminal character and may in fact prejudice minorities unfairly.

(10) Inquiry into native language, or the manner in which a foreign language was acquired, indicates national origin.

(11) Request for list of all clubs, societies and lodges of which applicant is a member--may be used to determine religion, political affiliation, race, sex, age, or national origin and is rarely relevant to job performance.

(12) Names of relatives other than applicant's mother, father, spouse and children--may indicate national origin.

(13) Request of name of applicant's bishop, pastor, or religious leader.

(14) Request for garnishment record--minorities suffer garnishment more than whites, and the record bears little or no relationship to job performance.

(15) General question asking whether applicant is physically handicapped--shows intent to bar all handicapped persons; should ask for particular kind of handicap, since some handicaps would not preclude adequate performance of particular jobs.

(c) Lawful pre-employment inquiries.

(1) Inquiry into different name used while previously employed by the same company, nickname, or any other change of name necessary to check work and educational records.

(2) Inquiry into present address, previous address in the U.S., and duration of residency in the city, county or state.

(3) Inquiry into age of applicant, if necessary as a bona fide occupational qualification.

(4) Where age is a bona fide occupational qualification, the requirement that age be proved by some form of document that does not indicate place of birth, ancestry or religion.

(5) Inquiries into religious affiliation if the occupation necessarily requires that the applicant work on Saturday.

(6) Inquiry into an applicant's military experience in the U.S. Armed Forces or a state militia, and the particular branch of the military in which applicant served.

(7) Request for conviction record, if any, and the disposition of the case or cases.

- (8) Request for foreign languages spoken and degree of fluency.
- (9) Inquiry into the organizations of which an applicant is a member-excluding organizations the name or character of which indicates the race, creed, color, national origin, age, sex, or political affiliation of its members.
- (10) Names of applicant's mother, father, spouse, and children.
- (11) Request for type and degree of physical or mental ability.

